Filed 4/24/06 P. v. Baldwin CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL BALDWIN, Defendant and Appellant.	B181123 (Los Angeles County Super. Ct. No. TA072808)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary E. Daigh, Judge. Modified in part and affirmed in part.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General of the State of California, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster, Supervising Deputy Attorney General, and Corey J. Robins, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Gabriel Baldwin was convicted, following a jury trial, of one count of murder in violation of Penal Code[1] section 187, subdivision (a), one count of attempted robbery in violation of sections 211 and 664, two count of robbery in violation of section 211 and one count of being a felon in possession of a firearm in violation of section 12021, subdivision (a)(1). The jury found true the allegations that the murder was committed during the commission of a robbery within the meaning of section 190.2, subdivision (a)(17), and that appellant used and discharged a firearm in the commission of the murder within the meaning of section 12022.53, subdivisions (b) through (e) and personally used a firearm in the commission of the robberies within the meaning of section 12022.52, subdivision (b). The jury also found true the allegations that all the crimes were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(A). Appellant admitted that he had a prior felony conviction within the meaning of section 12021. The trial court found true the allegations that appellant had suffered a prior serious felony conviction within the meaning of section 667, subdivision (a), and sections 667, subdivisions (b) through (i) and 1170.12 (the "three strikes law") and that he had served a prior prison term within the meaning of section 667.5, subdivision (b). The trial court sentenced appellant to life in prison without the possibility of parole for the murder, plus a term of 25 years to life for the section 12022.53, subdivision (d) firearm enhancement in connection with the murder. The trial court stayed the remaining enhancements to the murder conviction as well as sentencing under the three strikes law, imposed various appropriate terms and enhancements on the other four counts, stayed the sentence for the attempted robbery, and ordered one robbery sentence to run consecutively to the murder sentence and another to run concurrently. Sentence on the firearm conviction was imposed concurrently.

Appellant appeals from the judgment of conviction, contending that there is insufficient evidence to support his murder conviction, and further contending that the

---

[1] All further statutory references are to that code unless otherwise indicated.

felony-murder special circumstance is unconstitutional, and the section 12022.53, subdivisions (d) and (b), enhancements, and the parole revocation fine were improper under the facts of this case. Respondent contends that the trial court erred in failing to impose a five-year term pursuant to section 667, subdivision (a). We agree with respondent that the section 667, subdivision (a) enhancement term must be added. We also agree that the parole revocation fine must be stricken. We affirm the judgment of conviction in all other respects.

Facts

On August 11, 2003, at about 8:45 p.m., appellant and another man entered the Barron Liquor Store in Gardena. Appellant was wearing a dark ski mask and carrying a gun. The other man was also wearing a ski mask and carrying a gun. Appellant grabbed a store employee, Atsuji Mimura, in a chokehold. Someone asked where the money was. Mimura told them, then showed them. The men took cash from the cash registers. They also took a cell phone, wallet and cash from Mimura and a wallet from store employee Ignacio Escobedo. Mimura heard a siren. The men fled. The incident was captured on a security video.[2]

On September 21, 2003, at about 1:00 a.m., patrons and employees of the Knotty Pine Bar in Gardena heard one or two gunshots near the bar's entrance. Appellant and one to three other men walked into the bar, all wearing ski masks. The first man to enter the bar was carrying two handguns. The jury found that this man was appellant. He announced in Spanish that the men were robbing the people in the bar. Everyone was told to lie down. Appellant slipped and fired two gunshots. The men fled without taking anything. A television set in the bar was hit by a gunshot.

Oscar Payan, a bar customer, was found bleeding on the sidewalk outside the bar. Someone called 911. Payan later died from a single gunshot wound to the chest. The gun which fired the shot was touching Payan's skin, but not pressing into the skin.

---

[2] The video was played for the jury.

Police recovered two .9 mm shell casings and a projectile from the Knotty Pine Bar. They also recovered a cell phone from the bar's parking area. The phone rang while police were at the scene, and the caller ID "Lil Docc" appeared on the screen. A telephone number entered in the phone was labeled "Mom." This number belonged to Roberta Williams, the mother of Devin Murphy. She lived two doors down from appellant.

On September 26, 2003, a search warrant was executed at appellant's residence. This warrant was apparently not related to the Knotty Pine Bar crimes. Two handguns were recovered from a green Chevrolet Monte Carlo registered to appellant and parked in his garage. One of the guns was a .9mm with the serial number filed off. This gun had bloodstains on it. Tests later determined that the two shell casings found at the Knotty Pine Bar had been fired from this gun,

Police interviewed appellant a number of times, beginning on September 27, 2003. Detective Rodriquez met with appellant three times. At the first meeting, appellant provided some information about the liquor store robbery. At the second meeting, appellant provided some information about the bar crimes. At the third meeting, on October 31, 2003, appellant admitted that he was the man shown jumping over the counter in the video of the liquor store robbery. Appellant admitted that he was member of the Altadena Block Crips. He said the other man in the liquor store robbery was Rashon Mosley, a member of the Traginew Park Crips.

Appellant's fourth interview with police was conducted by Sergeant Clark on November 5, 2003. During that interview appellant stated that he was part of an eight or nine man group that committed robberies in the Compton area. Usually the actual robbery was committed by three to five men, while the others would be nearby monitoring police scanners. The monitors would contact the robbers if the police were coming. Appellant admitted that he was involved in planning in the Knotty Pine Bar robbery, and was responsible for making sure that everyone got away safely. According to appellant, the Knotty Pine Bar was the group's second choice. One of the group's

members had been concerned that they would have a confrontation at their first choice location.

The plan at the Knotty Pine Bar was to secure the back of the location to prevent any of the participants from being shot. Appellant claimed that "J-Dog" was the man armed with two guns during the robbery. J-Dog was later identified as Gerald Evans, a Traginew Park Crips gang member. Appellant said that "Diamond" and Devin Murphy were the other two men in the bar. He said that the men were members of the Hoover Street Crips and Traginew Park Crips, respectively. Murphy stood just inside the door holding an AK-47. Appellant said that a victim would not get out of J-Dog's way, and that the gun accidentally discharged. He also said the gun accidentally discharged when J-dog slipped on a wet floor near the bathroom.

Sergeant McCarthy told appellant that he would investigate appellant's statements and it was important to be honest. Appellant then admitted that he was inside the Bar when the attempted robbery and murder took place. He said that a total of four robbers were present. Appellant maintained that J-Dog was the man with two guns who fired the shots that night, and that the shots were fired accidentally. He said that the other people in the group were nearby at Devin Murphy's house monitoring police scanners.

Detective Rodriguez testified as a gang expert on the Traginew Park Crips. The gang's primary activities are drug sales and transportation. They are also involved in gang wars with shootings. He testified that members of that gang had committed a number of crimes which satisfied the requirements of the section 186.22 gang enhancement.

Discussion

1. Sufficiency of the evidence

Appellant contends that it is not possible to determine whether the jury believed that he was the actual shooter of Payan or simply an aider and abettor in the attempted robbery of the Knotty Pine Bar, during which Payan was killed. He further contends that, if he were not the actual shooter, there was insufficient evidence to support the true

finding on the special circumstance allegation. Specifically, he contends that there was no evidence that he was subjectively aware of any homicidal tendencies of his accomplices and that the evidence showed only that the shots fired in this case were fired accidentally. We do not agree.

In reviewing a challenge to the sufficiency of evidence, "the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People* v. *Mincey* (1992) 2 Cal.4th 408, 432.)

The standard of review is the same when the prosecution relies on circumstantial evidence to prove guilt. (*People* v. *Rodriguez*(1999) 20 Cal.4th 1, 11.) "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]" (*People* v. *Thomas* (1992) 2 Cal.4th 489, 514, internal quotations omitted, citing *People* v. *Bean* (1988) 46 Cal.3d 919, 932-933.)

Here, the jury found true the allegation that appellant personally and intentionally discharged a firearm during the robbery, causing death. Thus, the jury did find that appellant was the actual shooter.

We see sufficient evidence to support that finding. Appellant acknowledged that the same gun was used at the Barron Liquor Store and the Knotty Pine Bar. Appellant was shown in a photograph holding the gun in the Barron Liquor Store. The gun was recovered from appellant's home six weeks later, after the Knotty Pine Bar murder. The jury could reasonably infer that appellant was in possession of and using the gun during the period between the store robbery and the gun's recovery, including during the Knotty Pine Bar murder. Appellant described the shooting to police as follows: "And dude wouldn't move out of his way. 'Cause his plan – I guess his plan was to go the back room, but instead it backfired. Then they didn't know if the guys in the back had a gun or

not. So they said the dude ran in there to lay – to hurry up and get to the back and lay the bag down, secure the bag so they wouldn't get shot. Laid her in there, hit the dud with the gun. The gun went off." The jury could reasonably infer that the "dude" was deliberately shot because he would not move out of the way of the shooter, who was in a hurry to get to the back room and prevent the bar's security from getting weapons.

To the extent that appellant also contends that the jury did not clearly find that appellant was the shooter because the jury also found true the additional allegation that "a principal" in the crime personally used and intentionally discharged a firearm causing death, we do not agree with his conclusion. However, even assuming this to be the case, we see sufficient evidence to support the special circumstance allegation as to appellant.

Section 190.2, subdivision (d), provides: "Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4."

The mental state of reckless indifference to human life is one in which the defendant subjectively appreciates or knows that his or her participation in the underlying felony creates a grave risk to human life. (*People* v. *Estrada* (1995) 11 Cal.4th 568, 577-578.)

Appellant contends that the prosecutor told the jury that it could find him guilty of first degree felony murder even if he were at Murphy's home, monitoring the scanners. Appellant contends that if he had been monitoring the scanners, he would not have been a major participant in the murder. Appellant is mixing apples and oranges. The requirements for felony murder and the special circumstances allegation are not the same. The jury was properly instructed on the special circumstance requirements of reckless indifference to human life and being a major participant. The prosecutor expressly told

the jury that if even one juror believed that appellant was monitoring the scanners, he was not a major participant, and the special circumstance allegation would fail. Thus, we see no possibility that the jury was confused about the requirements for the special circumstance allegation.

We see ample evidence that appellant, if not the actual shooter, acted with reckless indifference to human life. Appellant entered a bar with accomplices to commit an armed robbery which almost certainly would involve some victims who were under the influence of alcohol and whose behavior would therefore be unpredictable. The robbers believed that there was a strong possibility that guns were kept in a bag in the back of the bar, and made acquiring control of that bag a high priority. It was more than reasonable for the jury to infer that such a circumstance presented a grave risk to human life, and that appellant was aware of that risk.

2. Felony-murder special circumstance

Appellant contends that the felony-murder special circumstance of section 190.2, subdivision (a)(2) requires nothing more than proving a first degree murder based on the felony murder rule. He further contends that since the special circumstance does not provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not, the circumstance constitutes cruel and unusual punishment under the Eighth Amendment to the U.S Constitution. We agree with respondent that appellant has waived this claim by failing to object in the trial court. Assuming for the sake of argument that the claim were not waived, we would find no violation of appellant's constitutional rights.

As the California Supreme Court has explained, in *Lowenfield* v. *Phelps* (1988) 484 U.S. 231, the U. S. Supreme Court "made it plain" that the "triple use" of facts to support (1) the conviction of first degree murder on a theory of felony murder, (2) the finding of the felony-murder special circumstance, and (3) the imposition of the penalty of death did not violate the Eighth Amendment. (*People* v. *Marshall* (1990) 50 Cal.3d 907, 945-946.)

California law also allows the use of the same felony to qualify a defendant both for first degree murder and for a special circumstance justifying the death penalty. (*People* v. *Taylor* (2001) 26 Cal.4th 1155, 1183.)

We are bound by these decisions and so reject appellant's claim without further discussion.

3. Section 12022.53

Appellant contends that the trial court's imposition of a consecutive 25-year-to-life enhancement term violated section 654 and the merger doctrine of *People* v. *Ireland* (1969) 70 Cal.2d 522.

We have considered and rejected these contentions in *People* v. *Sanders* (2003) 111 Cal.App.4th 1371. Appellant disagrees with our reasoning in *Sanders*, but offers us no reason to reconsider our holding in that case.

In *Ireland*, the Supreme Court held that the felony-murder rule could not be applied when the only predicate felony which the defendant committed was assault, because the assault was an integral part of the homicide. The Court found that to hold otherwise would relieve the prosecution of the burden of proving malice, as most homicide cases involve an assault. (*People* v. *Ireland*, *supra*, 70 Cal.2d at p. 539.)

We see nothing about a firearm enhancement which reduces the prosecution's burden of proving malice, or any other element of murder, and so in *Sanders* we found that the *Ireland* merger doctrine has no application to firearm enhancements. We noted that the *Ireland* merger doctrine has never been applied outside the context of felony murder and assault. (*People* v. *Sanders*, *supra*, 111 Cal.App.4th at p. 1374.) We also recognized that "[t]hus far, there is no authority extending the merger doctrine to enhancements." (*Ibid*.) That remains the situation two and a half years later.

Section 654 provides that "[a]n act or omission punishable in different ways by different provisions of the law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall be punished under more than one provision. . . ." The California Supreme Court has not yet addressed whether section

654 applies to enhancements. (See *People* v. *Oates* (2004) 32 Cal.4th 1048, 1066, fn. 7. [declining to address the People's argument that section 654 does not apply to enhancements].)

In *Sanders*, we agreed with the three other Courts of Appeal which had found that section 654 does not apply to a single firearm enhancement to an offense committed by the use of a firearm, unless such use was a specific element of the offense. (*People* v. *Sanders*, *supra*, 111 Cal.App.4th at p. 1375.) Appellant disagrees with our conclusion in *Sanders*, but offers only one case decided after *Sanders* to support his position.[3] He contends that our Supreme Court's holding in *People* v. *Seel* (2004) 34 Cal.4th 535 "dramatically altered the perspective from which California views its historical treatment of 'sentencing enhancements" and supports his contention that section 654 applies to sentencing enhancements. We do not agree.

The Court in *Seel* found that double jeopardy protection precluded retrial of a premeditation allegation. (*People* v. *Seel*, *supra*, 34 Cal.4th at p. 539.) The basis of this holding was the U.S. Supreme Court's holding that "any fact other than a prior conviction that increases punishment beyond the prescribed statutory maximum 'is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.' (*Apprendi* v. *New Jersey* (2000) 530 U.S. 466, 494, fn. 19)" (*People* v. *Seel*, *supra*, 34 Cal.4th at p. 539.) "In other words, '*Apprendi* treated the crime together with its sentence enhancement as the "functional equivalent" of a single "greater" crime. [Citations.]' [Citation.]" (*Id*. at p. 539, fn. 2.) We see nothing in this holding that would indicate that section 654 applied to preclude imposition of a firearm enhancement to the crime of murder. To the contrary, under *Seel*, the murder in this case together with the firearm enhancement would be a single crime, and not subject to section 654.

Appellant also contends that even if section 654 does not apply to some enhancements, it applies in his case because a firearm enhancement is a lesser included

---

[3] To date, no Court of Appeal has disagreed with our conclusion in *Sanders*. Our Supreme Court has not addressed this issue.

offense of murder with a firearm. We do not agree. One offense is included in another offense if the legal elements of the lesser offense are included in the legal elements of the greater offense, or if the greater offense, as pled in the accusatory pleading, cannot be committed without also committing the lesser offense. Clearly, murder can be committed without using a firearm, and thus firearm use is not a lesser include offense under the legal elements test. Our Supreme Court has held that a weapons use enhancement allegation is not part of an accusatory pleading for purposes of defining lesser included offenses. (*People* v. *Woolcott* (1983) 34 Cal.3d 94, 96, 100-102.) Appellant notes that the dissent in *Woolcott* reached the opposite conclusion, and argues that the dissent is correct. We are bound by the majority's holding.

4. Subdivision (j) of section 12022.53

Appellant contends that the language of subdivision (j) of section 12022.53 bars the imposition of a 25-year-to-life enhancement in cases such as his, where the defendant receives a sentence of life without the possibility of parole for his crime. We do not agree.

Section 12022.53, subdivision (j) provides in pertinent part "When an enhancement specified in this section has been admitted or found true, the court shall impose punishment pursuant to this section rather than imposing a punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment."

Appellant contends that "another provision of law," section 190.2, subdivisions (a)(3), (10) and (17), provides a sentence of life without the possibility of parole, "a greater penalty or longer term of imprisonment." He concludes that section 12022.53 therefore does not apply.

The California Supreme Court has now considered and rejected this argument. (*People* v. *Shabazz* (March 27, 2006, S131048) ___ Cal.4th ____ [2006 WL 759674; 2006 DJAR 3567].) A sentence enhancement of 25 years to life in prison under section

12022.53, subdivision (d), may properly be imposed in addition to a defendant's sentence of life in prison without the possibility of parole. (*Ibid*.)

5. Firearm enhancements - robbery

Appellant contends that the trial court erred in imposing both the firearm enhancement and the gang enhancement to the terms for the robbery convictions. We see no error.

Appellant's argument is based on his belief that the firearm enhancements at issue did not involve a finding of personal use. He is mistaken. The jury found true the allegations that appellant personally used a firearm in the commission of the two robberies, within the meaning of sections 12022.53, subdivision (b). As appellant acknowledges, when a firearm enhancement involves personal use, both that enhancement and a gang enhancement may properly be imposed. (§ 12022.53, subd. (e).)

6. Parole revocation fine

Appellant contends that the parole revocation fine must be stricken, since he was sentenced to a life term without the possibility of parole. Respondent agrees. We agree as well.

A parole revocation fine is not appropriate where the defendant's overall sentence does not anticipate a period of parole. (*People* v. *Petznick* (2003) 114 Cal.App.4th 663, 687; *People* v. *Oganesyan* (1999) 70 Cal.App.4th 1178, 1183.) Accordingly, the fine must be stricken.[4]

---

[4] We note that it is not clear that the trial court intended to impose such a fine. The Reporter's Transcript shows that the trial court did not impose a parole revocation fine. The Clerk's Transcript shows that a parole revocation fine was imposed.

7. Section 667, subdivision (a) enhancement

The trial court found true the allegation that appellant had suffered a prior conviction for attempted murder. Respondent contends that the trial court erred in failing to impose a five-year enhancement term pursuant to section 667, subdivision (a). We agree.

When a complaint alleges that a defendant has suffered a prior serious felony conviction within the meaning of section 667, subdivision (a), and that allegation is found true by the trier of fact, the trial court is required to impose a five-year enhancement term, unless the conviction is stricken or prohibited by some other provision of law.

Here, the trial court found that appellant had suffered a prior conviction for attempted murder, which is a serious crime within the meaning of section 667, subdivision (a). (§§ 667. subd. (a)(4), 1192.7, subd. (c)(9).) The section 667, subdivision (a) allegation does not appear to have been stricken. There does not appear to be any legal impediment to imposing the enhancement. Accordingly, the abstract of judgment is ordered amended to show a five-year enhancement term pursuant to section 667, subdivision (a).

Disposition

The abstract of judgment is ordered amended to delete the parole revocation fine and to add a five-year enhancement term pursuant to section 667, subdivision (a). The clerk of the Superior Court is directed to prepare an amended abstract of judgment reflecting these changes and to deliver a copy to the Department of Corrections. The judgment of conviction is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, Acting P.J.

We concur:

MOSK, J. KRIEGLER, J.